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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 1194-85

J. BUCKNER FISHER, Receiver of The First National Bank  
of Chattanooga, Tennessee, Petitioner,

v.

LOUISE WHITON, Executrix of the Estate of ANNIE R.  
NOTTINGHAM, Deceased;

O. B. WUNSCHOW, Executor of the Estate of MILDRED  
WILLIAMS, Deceased;

GEORGE C. MCKENZIE, Receiver and Commissioner for  
R. A. LOWERY, J. A. LOWERY and KATHERINE TULLOCK,  
Children of CLARA LOWERY, et al.

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Children of CLARA LOWERY, et al.**

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## **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

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**MAY IT PLEASE THE COURT:**

Those named as defendants to the petition for writ of certiorari deem it proper to reply to the contentions of the applicant for the writ according to the manner in which the facts are presented and the questions for determination are raised in the brief of the applicant.

### **I.**

**Opinions and decrees of courts below:**

References to the record as contended by the applicant for writ of certiorari are correct.



II.

The summary statement of facts as presented by the applicant for writ of certiorari is substantially correct.

III.

The question presented by the applicant for the writ is one of the decisive matters for consideration in allowing or denying the writ of certiorari.

Another question not presented is that of jurisdiction of this Court.

Another question not presented in the application involves whether or not a federal question is presented or only the application of a Tennessee statute and a construction thereof as determined by the Tennessee courts on the plea of the statute of limitation to the claim of petitioner, J. Buckner Fisher, Receiver.

Tennessee Code of 1932, Sec. 8225;  
Tennessee Code of 1932, Sec. 8604;  
Rawlings v. Ray, 312 U. S. 96;  
Pufahl v. Parks, 299 U. S. 217;  
Coffey v. Fisher, 100 Fed. Rep. (2nd) 51.

VI.

**Federal question:**

While there seems to be no question that the Comptroller of Currency has the authority to levy an assessment and the petitioner the authority to collect it, the primary question here involved is as to whether or not the Tennessee statute 1932 Code 8604 and 8225 defeat the claim of petitioner by reason of the statute of limitations. This suit involves priorities of creditors of the Estate of C. C. Nottingham, deceased, which is shown to be hopelessly insolvent.

See Master's report, Record p. 68 et seq.

## VII.

Petitioner has stated his reasons for the allowance of the writ:

(1) That the decision in *Rawlings v. Ray* (supra) is controlling. It will be seen that no suspensions, and especially indefinite suspensions, were involved. Neither was there in the *Rawlings v. Ray* case a deceased estate under consideration where a speedy closing up is essential.

(2) No statute, such as 8604 of 1932 Tennessee Code, was involved.

(3) The question raised indicating a declaratory judgment for the purpose of advising the Receiver or Comptroller in future liquidations is not properly before the Court, and it is not shown by petitioner that there is a contrariety of judicial opinion involving a statute such as is the law of Tennessee, the only application of such statute being considered in the single case of *Coffey v. Fisher* (U. S. C. C. A.), so far as the federal court is concerned; otherwise a moot question is presented.

## VIII.

In conclusion, these defendants, in order to more adequately present their defense, insist that:

Section 8225 of the Tennessee Code provides that all claims maturing after the death of the deceased become barred unless suit is filed within six months from the accrual of the right of action.

The facts stated in the petition for certiorari are substantially correct, and need not be repeated here. The stipulation quoted (Record 76) supplies the facts necessary to be considered in order to determine the primary controversy, which rests upon the legal question, "When did the



Statute of Limitation of six months begin to run?" The assessment was made April 19, 1934, payable May 23, 1934.

The Tennessee Court of Appeals sustained the Chancellor in holding that the Statute of Limitations began to run on May 23, 1934, the date the assessment was made payable, and approximately fifteen months before the suit was brought.

The learned Chancellor felt bound by the decision by the United States Court of Appeals in the case of Coffey, Receiver, v. Fisher (U. S. C. C. A.), 100 Federal Reporter (2nd) 51, involving the identical extensions here under consideration, so that Section 8604 of the Tennessee Code was applied. This section is as follows:

"Time begins to run from accrual of right—not demand. When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand."

As said by the U. S. Court of Appeals for the Sixth Judicial Circuit (Coffey v. Fisher, supra):

"The various extensions for time of payment should not be regarded as tolls of the statute, because it is of vital importance that estates be closed speedily. While the extensions were acts of grace to unfortunate stockholders, and made here, as stated in the declaration, at their request, through their committee and for their convenience, nevertheless they do not for that reason toll the statute. But, tested by the declaration, they were not made at the request of defendant, who was not a stockholder and had no connection with the committee. The extensions were made upon the assumption that the right to sue existed from the date of the assessment and in such situation, even upon plaintiff's

contention that Sec. 8608 applied, still his suit was barred by the provision of Sec. 8604 of the Tennessee Code, to the effect that, 'when a right exists, but a demand is necessary to entitle a party to action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand. The order of the District Court is affirmed.' "

Counsel for the petitioner take the position that the case of *Rawlings v. Ray*, 312 U. S. 96, is conclusive of the question here under consideration. To extend the authority of the Comptroller to meet the contentions of the petitioner in respect to the suspensions and extensions, would conflict with this Court's holding in *Pufahl v. Parks* (supra) approved in the *Rawlings v. Ray* case and *Coffey v. Fisher* (supra).

There is nothing in *Rawlings v. Ray* that is contrary to either the opinion of the learned Chancellor or of the learned Court of Appeals. In the case of *Rawlings v. Ray* there was only one question involved, and that was as to whether or not the Statute of Limitations began to run from the date the assessment was levied or the date that it was made payable. The Court held that the Statute of Limitations ran from the date the assessment was made payable. There were no extensions of time involved in that case. There was no statute such as 8604 Tennessee Code involved in that case. Therefore, that case is no authority here. In the case of *Coffey v. Fisher* the identical extensions involved here were the subject of the issues made. The Tennessee statute 8604 was applied.

It will be seen by the stipulation that on May 17, 1934, the Comptroller undertook to extend the payment of the assessment penalty indefinitely. Nearly a year later he began to make other suspensions. While there is nothing in the record before the Court to indicate why these sus-

pensions were made, yet in *Coffey v. Fisher*, *supra*, it appears that they were made at the request of certain stockholders being represented by a committee. The committee did not make the request for delay upon behalf of some of the stockholders under Section 8227, Tennessee Code, providing:

"Also, if any creditor, after making demand of his debt or claim, delay to bring suit, for a definite time, at the special request of the executor or administrator, the time of such delay shall not be counted in said period of limitation."

So, it does not appear that the request for an extension of time was made by any executor or administrator, but it would rather appear from that decision that the request was made by some of the general stockholders. Certainly, if the Receiver depended upon any request made by Mrs. Nottingham, executrix, the information would have been in the Receiver's hands, and the burden of proving such special request would be upon the Receiver. There is no evidence in the record that Mrs. Nottingham made any request for any extension or authorized any committee to do so.

The Receiver was not appointed by the Court, but by the Comptroller of Currency. The Receiver is the arm of the Comptroller, and any act performed, or the failure to perform any act, on behalf of the Comptroller, is necessarily binding upon the Receiver for whom he acts.

To say that the Comptroller can by these extensions, and particularly the one on May 17, 1934, extending the payment indefinitely, and thus prolong the requirements of closing estates speedily, would result in striking down and nullifying our Statutes of Limitation and thus prolong the administration of estates indefinitely.

There is no question but that the state Statutes of Limi-

tation are applicable to claims for double assessment upon stock of a national bank, and neither does the counsel for the Receiver make any claim to the contrary.

McDonald v. Thompson, 184 U. S. 71-72;  
McClaine v. Rankins, 197 U. S. 154-158;  
Rawlings, Receiver, etc. v. Ray (supra);  
Pufahl v. Estate of Parks, 299 U. S. 217-228, 81 Law.  
Edition 153.

Our statute, section 8604, has been applied in the following cases:

Coffey v. Fisher, 100 Fed. Rep. (2nd) 51. Involving the identical question under consideration.

Gillespie v. Broadway National Bank, 167 Tenn. 245, 68 S. W. (2nd) 479 Involving payments under a lease.

Todd v. Third National Bank, 172 Tenn. 586, 113 S. W. (2nd) 740. Involving a note payable on demand, but bearing interest after one year.

First National Bank of Sparta v. Hunter, 125 S. W. (2nd) 183-187 (Tenn.). Holding that a note payable on demand was subject to the Statute of Limitations from its date and not from the date of the demand.

So that all during that period of time from May 23, 1934, to June 19, 1934, when the time for payment was extended indefinitely, and from June 26, 1934, to March 11, 1935, during another indefinite suspension, the payment of the assessment could have been required and suit filed, and, therefore, the Statute of Limitations was in operation, or Section 8604 of the Code is meaningless.

There is nothing in the cases relied upon by counsel for the Receiver to the contrary.

The small amount shown to have been realized in the administration of the Nottingham estate strongly shows

that there could be no purpose to be served by any delay to sue the Nottingham estate.

The appellant in argument says that if suit had been filed during the time that the payment of assessment was indefinitely suspended that he would have been met with the defense of prematurity. There was no way that the executrix could have successfully pleaded prematurity, since she did not ask for any extension or delay, and the right to make a further demand existed all during the interim, and, in fact, had once been made. If the Receiver or the Comptroller could toll the statute for fifteen months by successive and indefinite postponements, then he could have suspended the bar for two, five or ten years, or hold up the administration of the Nottingham estate forever.

Regardless of 8604 Tennessee Code, it was the law of this state that the Statute of Limitations ran from the time when demand could be made, without regard to the time when demand is actually made.

Southworth v. Thompson, 10 Heis. 10.

As said by the Tennessee Court of Appeals, 155 S. W. (2nd) 882:

"We agree with the Chancellor that the reason assigned in Coffey v. Fisher for holding the statute not tolled by such extensions is sound, especially where, as in this case, there is nothing to indicate that the extensions were granted at the instance of the stockholder whose estate is being administered. As held in Pufahl v. Estate of Parks, 299 U. S. 217, the obligation of a stockholder becomes absolute when the Comptroller makes the assessment, and this is sufficient to support an action at common law against a living stockholder or the executor of a deceased stockholder. It is true, of course, as held in the Rawlings case, that the Comptroller cannot later obviate the self-imposed restriction upon the exercise of the right



of enforcement of the claim in instituting an action prior to the date fixed for payment. This is only to require of the Comptroller the exercise of honesty and fair play. It is quite a different thing to say that the Comptroller can, by successive extensions, without the consent of the executor stop the running of the limitation period to which all other creditors are subject. The right to fix the later date for payment, though recognized in the Rawlings case, is only an implied right and should not be so extended as to embarrass and delay personal representatives in administering decedent estates. The policy of our statute law has been to shorten the period within which claims must be filed against decedent estates. In the case of obligations not due such claims must be filed within six months after maturity. In this case, by the process of granting extensions, the Receiver is attempting to assert a claim which was 'rendered absolute' almost twice this period before suit was instituted. To sustain the contention of the Receiver would enable the Comptroller to set at naught a limitation upon the right to sue applicable to all other creditors. As held in *Pufahl v. Estate of Parks*, supra, the Comptroller's order making the assessment converted a contingent obligation into one that became 'absolute' and enforceable from that date subject alone to the waiting period which was appurtenant to, and a part of, the order of assessment."

The conclusions of the Court of Appeals above quoted are well established by reason and authority. The writ of certiorari was properly denied by the Supreme Court of Tennessee.

And the further observation that a person cannot by his own act postpone or obviate a right of defense which exists in another by reason of the failure to take the prerequisite steps necessary to the institution of suit:

"The well established rule is that when some pre-



liminary action is prerequisite to the institution of suit, and the right to take such action rests with the claimant, the operation of the statute of limitations cannot be defeated by failure to act or by long and unnecessary delay in taking the antecedent step."

And this observation or conclusion is well supported by the text in 17 B. C. L. 756, which is quoted in the Court of Appeals' opinion.

The case cited by the Receiver's solicitors, to wit, Kirby v. Springfield Institution for Savings et al., indicating a liberal discretion on the part of the Comptroller, cannot be construed to authorize the Comptroller to nullify our statute of limitations and thus defeat the application of our local laws.

McDonald v. Thompson, supra;  
McClaine v. Rankin, supra;  
Rawlings v. Ray, supra;  
Pufahl v. Parks Estate, supra.

All of the foregoing cases which were previously cited hold that the limitation laws of the state where the right of action accrues are determinative.

Ridge v. Cowley, 74 Tennessee 167;  
Erie Railroad v. Tompkins, 304 U. S. 178;  
Jenkins v. De War, 112 Tennessee 686;  
Pufahl v. Parks, 299 U. S. 217;  
Rawlings v. Ray, 312 U. S. 96.

It is evidently the opinion of counsel for the petitioner that the Rawlings case overruled the Pufahl case, but the Pufahl case was not even criticized, the Court saying:

"it is not to the contrary."

Commenting approvingly on the Pufahl case it was said in the Rawlings opinion:

**"We said that where an assessment had been made in the decedent's lifetime an accrued and provable debt affixed against his estate, and if the assessment were made after his death a claim against the funds and assets of the estate accrued as of the date of the assessment. Further that the claim of the receiver, although based upon a Federal Statute, could be enforced only in conformity with the law of the forum governing the recovery of debts of like nature."**

The Court also said in the Rawlings case with respect to the Pufahl decision:

**"We observed that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one, and that from the moment of the order of assessment the receiver had a claim which would support an action at common law," etc.**

The Court of Appeals in the instant case says that it is significant that the Supreme Court of the United States in *Rawlings v. Ray* did not refer to or overrule *Coffey v. Fisher*. The fact that *Coffey v. Fisher* was considered by the Court shows that the Supreme Court did not intend to overrule *Coffey v. Fisher* other than the application of the statute of limitations to the date the assessment was originally made payable. In other words, if the Supreme Court intended to overrule *Coffey v. Fisher* in the other respects, it undoubtedly would have said so.

Counsel for the Receiver cite *Strasburger v. Schram*, 93 Fed. (2nd) 246, as being applicable. In the first place, this decision was made by the District Court, and no appeal was taken. In the second place, no such statute as Section 8604 of the Tennessee Code was involved. Neither was an estate involved in *Strasburger v. Schram* where speedy liquidation is required. It seems that the District

Judge made the pronouncement quoted in the petitioner's brief for the reason that he could not find any judicial authority to the contrary. The decision in that case should have no weight here.

Therefore, the petition for a writ of certiorari by the Receiver of the First National Bank should be denied.

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